***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 76-6018



*To be argued by*
WALLACE MUSOFF

B

In The

## United States Court of Appeals

For The Second Circuit

ANDREW L. STONE and M. JEANNE STONE,

*Plaintiffs-Appellants,*

P/S

*vs.*

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MANHATTAN DISTRICT,

*Defendants-Appellees.*

*On Appeal From the United States District Court for the Southern District of New York*



# BRIEF FOR PLAINTIFFS-APPELLANTS

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## CITATIONS

## Statutes Involved

Title 26 U.S.C. §6212(a):

In general. --If the Secretary or his delegate determine there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Title 26 U.S.C. §6213(a):

Time for filing petition and restriction on assessment. --Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Title 26 U.S.C. §6861(a):

Authority for making.--If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency

(together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

Title 26 U.S.C. §7421(a):

Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

## QUESTIONS PRESENTED

I. Whether the determination by the Court below that it had no jurisdiction to hear plaintiffs' suit, without ascertaining the factual basis for the assessment, is clearly erroneous?

II. Whether the quantum of proof, which must be presented by the Government in an evidentiary hearing, must establish that the jeopardy assessment was not so excessive as to be a taking under the guise of a tax?

III. Whether the Court erred in determining that judicial review of the underlying jeopardy determination is precluded?

## PRELIMINARY STATEMENT

Andrew L. Stone ("Stone") and M. Jeanne Stone appeal from an Opinion and Order by the Honorable Edward Weinfeld, United States District Judge, Southern District of New York, filed on December 2, 1976, dismissing plaintiff's complaint filed in 74 Civil 3643 for lack of jurisdiction. 1/

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1/ In dismissing the complaint, Judge Weinfeld further ordered:

> The complaint is dismissed for lack of jurisdiction. The dismissal also applies to the claim alleged to be for breach of contract, since the prayer for specific performance of the agreement affects the assessment or collection of taxes. However, the dismissal of that claim is without prejudice to the commencement by plaintiffs of a new action for breach of contract against the government (not against the District Director) in the sum of $10,000, or alternatively, with leave to plaintiffs, if so advised, to serve an amended complaint against the government in this action limited to a claim solely for breach of the alleged agreement in the sum of $10,000.

Pursuant to a Stipulation between the parties filed on January 30, 1976, 74 Civil 3643 was dismissed insofar as an amended complaint may be filed,without prejudice to the rights of the plaintiffs to bring an action de novo against the United States of America for breach of contract. (A 111)

## FACTS

On February 7, 1972, the District Director of Internal Revenue, Manhattan District, approved a jeopardy assessment against plaintiffs, ostensibly under the authority given him by 26 U.S.C. §6861. The amount of the jeopardy assessment was $7,108,861.73. On the same date, a jeopardy assessment was made against Francis Rosenbaum emanating from the very same alleged deficiencies in income taxes.

Immediately thereafter, the Internal Revenue Service liened and levied upon substantially all of the respective assets of the plaintiffs and Francis Rosenbaum. When the jeopardy assessments were made both Andrew Stone and Francis Rosenbaum were incarcerated in connection with their plea to certain counts of an indictment against them in the District of Columbia and to Stone's plea to one count of an indictment in the Eastern District of Missouri.[2/] All remaining counts in each indictment were dismissed.

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2/ In 1968, Andrew Stone was indicted in the United States District Court for the District of Columbia (Cr. No. 1233-68) for one count of conspiracy to defraud the Government from January, 1963 until February, 1967 and twenty-nine substantive counts of fraud and illegal kickbacks. Stone thereafter pleaded guilty to Count 1, the conspiracy count, and to substantive Counts 3, 7, 8-11, 15 and 16. In 1969, Andrew L. Stone was also indicted in the United States District Court for the Eastern District of Missouri (69 Cr. 52(3)) for one count of conspiracy to violate the Mutual Security Act from 1961 until 1969 and sixteen substantive counts of violations of said Act. Andrew Stone pleaded guilty to one count of this indictment.

At the time the jeopardy assessment was made, the bulk of the assets of Stone were being held in escrow pursuant to an escrow agreement, executed on July 24, 1970, between Stone, the United States and St. Louis Union Trust Company, the latter serving as escrow agent. The terms of the escrow agreement provided that the income and dividends from the corpus, totalling to 2.5 million dollars in short term securities and other securities, were to inure to Stone. On its part, the United States agreed as follows:

> 7. The United States agrees that, so long as Stone shall not be in default under any of his agreements hereunder, the Civil Division of the United States Department of Justice will not institute attachment proceedings against the property and assets of Stone, and shall use its best internal efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against the property assets of Stone. ( A 44)

The escrow agreement was executed to insure the United States an available fund to satisfy potential civil damages asserted against Stone, in litigation commenced against him and others by the United States, arising from the

investigation of Stone relevant to his criminal indictments.[3/]

Notwithstanding the escrow agreement and the explicit provision contained therein of the United States to exercise "its internal efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against the property and assets of Stone," the Internal Revenue Service, on the alleged basis that Stone's income taxes for 1963 through 1967 were in jeopardy, assessed on February 7, 1972 deficiencies totalling $7,108,861.73 and served a Notice of Lien on the escrow funds.[4/]

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3/ In January 1969, the United States commenced a civil damage action against Stone, among others, in the United States District Court for the Eastern District of Missouri (Civ. No. 69C-24(2)) seeking double damages under the False Claims Act, 31 U.S.C. §231 et. seq., or, alternatively, single damages under theories of breach of warranty and payment of public funds by mistake. A similar suit was commenced in the District of Columbia (Civ. No. 230-69).

4/ On March 9, 1976, the Internal Revenue Service served a Notice of Levy and Demand on the St. Louis Union Trust Co. demanding that all accumulated income be turned over to satisfy the outstanding jeopardy assessment. On March 15, 1976 an interpleader action was commenced in United States District Court, Eastern District of Missouri, Eastern Division, Civ. No. 76-236C(1) to determine to whom the funds must be paid over.

On April 6, 1972, the Internal Revenue Service issued a statutory notice of deficiency to Andrew Stone and M. Jeanne Stone determining deficiencies in tax and additions to tax, pursuant to §6653(b) of the Internal Revenue Code of 1954, totalling $7,108,861.63 for the years 1963 through 1967. (A 48 - A 53) The overwhelming portion of income attributable to Andrew Stone per the statutory notice emanated from alleged unreported income of a corporation, Chromcraft, in which he was a principal, during the years 1963 through 1967 which the Internal Revenue Service has determined was a constructive dividend to Stone. The same such income has also been determined to be a constructive dividend to Francis Rosenbaum.

On July 3, 1972, Andrew Stone and M. Jeanne Stone filed separate petitions with the United States Tax Court. Andrew Stone's petition (Docket No. 5311-72) (A 54 - A 62) contested each and every allegation set forth in the statutory notice. M. Jeanne Stone's petition (Docket No. 5312-72) also contested each and every allegation set forth in the statutory notice, and further asserted that she was an innocent spouse within the meaning of 26 U.S.C. §6013(e). Issue has been joined in these actions and each is pending before the United States Tax Court for trial.

On August 21, 1974, plaintiff commenced an action in the Southern District of New York against the defendants-appellants (74 Civ. 3643). The complaint alleged, as is pertinent to this appeal, that the jeopardy assessment was made in violation of the self-promulgated guidelines of the Internal Revenue Service, that such assessments came as a direct consequence of newspaper publicity rather than for a tax purpose,[5/] that the underlying computations of tax were arbitrary and capricious, and that M. Jeanne Stone is an innocent spouse. Specific requests for relief were an order to be entered requiring defendants to specifically perform the escrow agreement of July 24, 1970; require the defendants to pay Andrew Stone six million dollars in dollars in damages;[6/] enjoin the defendants and any agency or employee thereof from in any way collecting upon or seeking to enforce by lien, levy or otherwise, the jeopardy assessments of February 7, 1972 against the plaintiffs.

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5/ Articles appeared commencing during the week of January 30, 1972 on a national basis with emphasis in the Washington Post and the St. Louis Post Dispatch questioning why Stone was permitted to receive the income from the escrowed assets.

6/ On January 15, 1974, plaintiff filed a First Amended Complaint limiting damages to $10,000 in conformity with 28 U.S.C. §1346(a)(2).

On December 11, 1974, defendants filed a Notice of Motion to Dismiss the Complaint pursuant to Rule 12(b)(2) and (c) of the Federal Rules of Civil Procedure on the grounds that the Court lacked jurisdiction over the subject matter of the action, and that plaintiffs failed to state a claim upon which relief could be granted. In support of the defendants' Notice of a Motion a Memorandum of Law was submitted. The arguments set forth in the Memorandum of Law do not dislose what specific facts the defendants possess to have attributed the unreported income of Chromcraft to plaintiff Andrew Stone, other than to say:

> ... and while plaintiffs may claim that the computation of this amount is arbitrary, the statutory notice of assessment, the criminal indictments and guilty pleas and the Tax Court pleadings indicate that this tax claim is not without merit. (Def. B. 24)

Nor does the Memorandum of Law disclose why a determination of jeopardy was made against plaintiffs on February 7, 1972.

To attempt to ascertain the specific facts underlying the determination of jeopardy, plaintiffs served upon the defendants on March 19, 1975 interrogatories. (A 78- A 89). On April 14, 1975, the parties entered into a stipulation extending the time for response from April 18, 1975 until

thirty days after the date on which the Court files an order disposing of the motion to dismiss. 7/ (A 90)

On December 2, 1975, the Honorable Edward Weinfeld issued an opinion (A 91 - A 110) wherein he granted defendants' motion to dismiss for lack of jurisdiction. The substance of the Court's opinion was that the requirements of Enochs v. Williams Packing & Navigation Company, 370 U.S. 1 (1961), had not been satisfied by plaintiffs; that the assessments are not wholly without foundation in fact; that the innocent spouse allegation by M. Jeanne Stone affords no jurisdictional basis for her claim; and, that, as a consequence, the Anti-Injunction Act as set forth in 26 U.S.C. §7421(a) bars the maintenance of plaintiffs' suit.

Additional facts relevant to the issues raised in this appeal are discussed under those individual points.

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7/ The interrogatories have not as yet been answered.

## POINT I

The determination by the Court below that it had no jurisdiction to hear plaintiffs' suit, without ascertaining the factual basis for the assessment, is clearly erroneous.

The opinion of the Court below, that it had no jurisdiction to entertain the suit brought by plaintiff is founded upon plaintiffs' failure to satisfy the exceptions to the restrictive provisions of 26 U.S.C. §7421(a) as carried out by the United States Supreme Court in Enochs v. Williams Packing & Navigation Co., Inc., 370 U.S. 1, 9 AFTR 2d 1954 (1962). The failure of the Court below to cause evidence to be adduced pertaining to the factual basis of the jeopardy assessment made against plaintiffs in the amount of $7,108,861.73 was clearly erroneous. Commissioner v. Shapiro, _____U.S. _____, 37 AFTR 2d 76-959 (March 8, 1976).

26 U.S.C. §7421(a) provides:

> Except as provided in section 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

In Enochs the issue arose as to whether the Anti-Injunction provision, set forth above, would preclude a suit by the petitioner to enjoin the collection of assessed social security and unemployment taxes.[8/] The petitioner advanced the position that if compelled to pay the assessments, bankruptcy would be the only course of action.

The Supreme Court held that §7421(a) was applicable because the petitioner had failed to satisfy two conditions which would extricate the petitioner from the statute's provisions. First, it must be shown that "under no circumstances could the Government ultimately prevail," and second "equity jurisdiction" must otherwise exist, i.e., the taxpayer can show irreparable harm. Enoch v. Williams Packing Co., 370 U.S. 1 (1970), 9 AFTR 2d at 1597.

On March 8, 1976, subsequent to the opinion of Judge Weinfeld in the instant case, the United States Supreme Court reviewed the Enochs case in Commissioner v. Shapiro, _____U.S. _____, 37 AFTR 2d 76-959. (1976)

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8/ The Court noted that the taxpayer has no right to petition the United States Tax Court pursuant to 26 U.S.C. 6212 & 6213 for the Tax Court has no jurisdiction to redetermine such taxes. This facet of Enochs is relevant to plaintiffs' POINT III, infra.

Shapiro was under order of extradition to Israel and was to depart the United States on December 9, 1973. On December 6, 1973, the Internal Revenue Service issued a jeopardy assessment against Shapiro for the years 1970 and 1971 asserting tax deficiencies totalling $92,726.41.[9/]

On December 13, 1973, Shapiro, having obtained a postponement of his extradition until December 16th, instituted suit alleging he owed no taxes; that without the funds levied upon he would not be able to comply with bail requirements; and further, that the jeopardy was made in bad faith. Shapiro sought a delay of his extradition until he could litigate the tax issue or, alternatively, sought an order requiring the levy to be vacated.

In addition to filing his complaint, Shapiro caused interrogatories to be served upon the Internal Revenue Service

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9/ The jeopardy assessment was purportedly made to insure the collection of the assessed liabilities from certain safe-deposit boxes and bank accounts of Shapiro containing some $35,000.00 in currency and the contents of the safe-deposit boxes. The Internal Revenue Service, the same date, served Notices of Lien and Levy on the bank accounts and safe-deposit boxes thereby precluding Shapiro from access to the contents of each. A finding of jeopardy, assuming the underlying assessments were valid, could not be disputed since the taxpayer was departing the United States and his funds were to accompany him for purpose of bail. Stone, however, was in jail when the jeopardy against him was made without access to his funds.

seeking information pertaining to the tax claims. The Internal Revenue Service responded to three of the nine interrogatories; however, it did not disclose the basis of the assessments. Subsequently the Internal Revenue Service supplemented its responses by appending thereto a statutory notice of deficiency. Shapiro v. Secretary of State, 499 F. 2d 527 (D. C. Cir. 1975).[10/]

The District Court determined that the Anti-Injunction Act applied and concluded that jurisdiction did not exist to vacate the levies.[11/]

The Court of Appeals for the District of Columbia reversed the decision of the District Court and remanded to determine whether the case fell within the exception to the Anti-Injunction Act as enunciated in Enochs. Shapiro v. Secretary of State, 499 F. 2d 527 (D.C. Cir. 1975).

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10/ The statutory notice asserted that petitioner had derived his alleged unreported income from the sale of narcotics.

11/ The District Court further concluded that the extradition issue was the exclusive jurisdiction of the State Department. This issue was affirmed and Shapiro was extradited during the pendency of his appeal.

In so holding, the Court of Appeals stated that Shapiro had shown "extraordinary circumstances causing irreparable harm for which he has no adequate remedy at law ..." (The fact that he would be incarcerated, lacking bail money, would preclude him from adequately contesting the tax assessment.) Supra at 535-36. The second test, whether the United States could establish its claim, was not resolved since no factual foundation was laid by the Government for the propriety of the assessment.

The Supreme Court affirmed the decision of the Court of Appeals, stating that Enochs v. Williams Packing, supra was controlling. The Court stated:

> It [Enochs] says instead that the question will be resolved on the basis of the information available to the Government at the time of the suit. Since it is absolutely impossible to determine what information is available to the Government at the time of the suit, unless the Government discloses such information in the District Court pursuant to appropriate procedures, it is obvious that the Court in Williams Packing intended some disclosure by the Government. 37 AFTR 2d at 76 - 965.

The Supreme Court dismissed the Government's argument that a taxpayer could allege "in conclusory fashion that he owes no tax" and compel the Government to justify the assessment, by stating that the taxpayer must still prove

irreparable harm and even if the Government is compelled to litigate, the full liability will not be contested, only "the question whether its assessment has a basis in fact." The Supreme Court further found that

> "...where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made. Supra at 76-965, 76-966.

It is in light of the recent Shapiro decision that the instant case must be measured.

First, the Government in the Court below never made the required showing, dictated by Shapiro, that the jeopardy assessment had a basis in fact. It is true that the Government submitted supportive documentation of the indictments of Andrew Stone and further asserted that he pleaded guilty to various counts of the indictments. However, these facts do not support, in and of themselves, the conclusion that unreported income of Chromcraft was constructively received by Andrew Stone, which is the theory of the statutory notice issued

to plaintiffs.[12/] (A 48- A 53). In order to establish a constructive dividend the Government must show that there is a distribution of available earnings or profits to a taxpayer under a claim of right or without any expectation of repayment. Clark v. Commissioner, 266 F.2d 698 (9th Cir. 1959). Without proof of economic benefit no constructive dividend can be determined. Shepard v. Commissioner, 340 F.2d 27 (6th Cir.1965). Not a scintilla of such evidence was offered by the Government in the Court below, and it is this proof that is essential under the Shapiro decision to cause the Anti-Injunction statute to apply.

Accordingly, failure to conform to the Shapiro decision requires reversal.

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12/ The opinion of the Court below, draws on the fact that "the criminal and civil damage actions furnish a substantial foundation to support the claim for additional taxes ..."(A 101) as did the statutory notice (A 101 -A 102). Yet, the Supreme Court in Shapiro struck down the use of the statutory notice as a sufficient basis to establish the validity of the assessment. Further, the nexus that must be drawn, i.e., unreported funds went to plaintiff, Andrew Stone, is not borne out by indictments. Francis Rosenbaum has been charged with the same alleged diverted income.

It is important to note that plaintiffs below argued that the foundation for irreparable injury, the second standard required to be satisfied under Enochs to avoid the provisions of §7421(a) of the Internal Revenue Code of 1954, is that the liens and levies by the Internal Revenue Service effectively disabled Andrew Stone from obtaining legal counsel to represent him in connection with pending civil litigation arising out of the criminal indictments, and further to compensate current counsel in connection with the tax cases before the United States Tax Court arising from the jeopardy assessments, and to insure such counsel funds to travel to interview prospective witnesses.

The Court below never reached the issue of whether the second standard of Enochs was satisfied, having concluded, erroneously in light of Shapiro, that the first test had been fully explored and the plaintiffs had failed in necessary proof. 13/

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13/ The Supreme Court in Shapiro, 37 AFTR 2d 76-959, 76-967 n. 15, discussed the question of the delay of two years since the taxpayer's petition had been filed with the United States Tax Court and that no final determination had been made of the liability. The Supreme Court stated that if delay in the proceedings was due to the taxpayer, then his remedy at law would have been ignored and equity would not intervene.

Plaintiffs herein filed petitions with the United States Tax Court. Andrew Stone was incarcerated until 1974 at

Clearly, opinion of the Court below did not result from the requisite factual showing of a valid basis for the assessment as dictated by Shapiro. Therefore, the case should be remanded for a proper evidentiary hearing.

## POINT II

> The quantum of proof which must be presented by the Government in an evidentiary hearing must establish that the jeopardy assessment was not so excessive as to be a taking under the guise of a tax.

Assuming arguendo that the Court below erred in not eliciting evidence as to the factual basis of the determination Stone received constructive dividends as set forth in the statutory notice, it becomes incumbent upon the Court to resolve the quantum of proof required to be presented by the Government to satisfy the requirements of Shapiro.

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13/ Continued

which time he secured counsel for the instant proceedings and trial of the case before the United States Tax Court. Both the taxpayer and Government have been engaged in discovery, which was adopted by the United States Tax Court effective January 1, 1975, and have been stipulated to facts and documents. At present some 500 documents set forth in over 200 Exhibits have been stipulated and the Government still estimates an eight week trial. The taxpayer has vigorously sought resolution of his case with the stark realization that unless he does so, or the liens and levies are lifted, he remains without funds to defend the onslaught of collateral litigation.

The basic guidance given by the Supreme Court is that the Government must be obligated "... to litigate the question whether its assessment has a basis in fact." Commissioner v. Shapiro, supra at 37 AFTR 2d 76-965. The Supreme Court also discussed certain events which transpired prior to argument in Shapiro and after the order of the Court of Appeals remanding the case. Supra at 37 AFTR 2d 76-963 n. 9. The Supreme Court noted that:

> ... the District Court interpreted the Court of Appeals' order in this case to require the government to come forward with proof sufficient to establish a factual foundation for the tax assessment and to negative a finding that the assessment is 'entirely excessive, arbitrary, capricious, and without factual foundations.'

The Government submitted an in depth affidavit by the Revenue Agent who had investigated Shapiro's tax liabilities. In addition, other affidavits were submitted, all pertaining to the alleged narcotics activities of the petitioner during the years in issue to establish unreported income. The Supreme Court, noting that once it had granted the Government's petition for a writ of certiorari, no further proceedings were held, stated:

> ... we mention [the proceedings of the District Court] because they are relevant to the question of what proceedings must eventually be conducted by the District Court following our decision of this appeal. Supra at 37 AFTR 2d 76-964, n. 9.

The same in depth disclosure is required by the Government herein to establish that the unreported income of Chromcraft was in fact received as constructive dividends by Andrew Stone during the years in issue since mere unreported income of Chromcraft, without more, does not sustain the underlying assessment. Nor would Shapiro be satisfied if the Government's allegations present a basis in fact to establish that 10% or 20%, or even 30% of the unreported income of Chromcraft was a constructive dividend to Andrew Stone.

The standard of proof is that first enunciated by this Court in Pizzarello v. United States, 408 F. 2d 579 (2d Cir. 1970) -- the Government must show its jeopardy assessment is not so arbitrary and excessive as to constitute a taking under the guise of a tax. See Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966); Lucia v. United States, 474 F. 2d 565 (5th Cir. 1973) (en banc).

## POINT III

The Court erred in determining that judicial review of the underlying jeopardy determination is precluded.

As the Court below correctly perceived, plaintiffs, in opposition to defendants' Motion to Dismiss the complaint, contended that the Anti-Injunction provisions of 26 U.S.C. 7421(a) are not applicable to preclude judicial inquiry into the good faith belief of the Secretary or his delegate that collection of the revenue is in jeopardy, because of the expressed exceptions in 26 U.S.C. sections 7421(a) and 6213(a).

Section 7421(a) precludes suits to restrain assessment or collection of taxes "except as provided in sections 6212(a) and (c), 6213(a)...." Reading Sections 6212(a) and 6213(a) together, Congress has provided that in the case of income taxes, which are involved herein, estate or gift taxes, no assessment of any asserted deficiency in such tax can be made prior to (1) the issuance of a stutory notice and (2) if a petition is filed with the Tax Court, until such decision of the Court has been finalized; or, if no petition has been filed, until 90 days after the issuance of the statutory notice (or 150 days if the taxpayer is outside the United States or the District of Columbia after the statutory notice is mailed).

See United States v. Bonaguro, 294 F. Supp. 750, 754 (E.D.N.Y. 1968), aff'd sub. nom. United States v. Dono, 428 F.2d 204 (2d Cir. 1970), cert. denied 400 U.S. 829 (1970); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966).

The instant facts demonstrate the soundness of the Third Circuit opinion in Sherman v. Nash, 488 F.2d 1081 (3d Cir. 1973). First, the instant jeopardy assessment was made April 6, 1972 some two years after Stone had entered into an escrow agreement with the Government placing the bulk of his assets outside of his reach and control. Further, the Internal Revenue Service had full knowledge at the time of the escrow agreement of all the underlying facts and did not then choose to deem Stone's tax liabilities in jeopardy. By the time the jeopardy was made, February 7, 1972, Stone was already incarcerated, with not even physical access to any of his assets.

Since Stone was worse off relative to the possible dissipation of assets at the time of the jeopardy than he was at the time of the preceding escrow agreement, when the Internal Revenue Service was already in possession of all the salient facts, what intervening facts occurred to cause the Internal Revenue Service to find the collection of Stone's taxes to be in jeopardy?

Plaintiffs submit that the only intervening facts consisted of unfavorable newspaper articles and that no good faith belief of jeopardy ever existed.

Consequently, unless the Secretary or his delegate entertains, at the time the determination of jeopardy is made under Section 6861(a), a good faith belief that jeopardy to the revenue exists and must be protected, no assessment can be made, and the mandate of Sections 6212(a) and 6213(a), not Section 7421(a), applies.

The Shapiro case did not involve the question of judicial inquiry into the belief of the Commissioner or his delegate in making the jeopardy since there was a finding that Shapiro was about to depart this country with his funds. If a tax were legally due from Shapiro, his departure with his assets would unquestionably place the collection in jeopardy. At the time the jeopardy was made against Andrew Stone he was incarcerated. Further, Enochs and its predecessor, Miller v. Standard Nut Margerine Co., 284 U.S. 498 (1932), involved the type of tax to which a notice of deficiency was not applicable.

The Court below chose not to pass upon the merits of plaintiffs position; instead, it determined without independent factual support as required by Shapiro, that the assess-

ments rested "on an independent solid basis "(A 106 ), and further that "the District Director's determination of a jeopardy is not subject to judicial review." (A 106- A 107). As the former never reaches plaintiffs' argument, it is the latter that will be analyzed.

The Court cited three cases which support its conclusion, Durovic v. Commissioner, 487 F.2d 36 (7th Cir. 1973), cert. denied 417 U.S. 919 (1974); Transport Mfg. and Equipment Co. v. Trainor, 382 F.2d 793 (8th Cir. 1967); Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957) and one case which is contra, Sherman v. Nash, 488 F.2d 1081 (3d Cir. 1973). In each of the cases relied upon by the Court, the position is maintained that no Court has the power to review the belief of the District Director in determining whether jeopardy to the revenue really exists, without any basis for such a conclusion.

In Sherman v. Nash, the Third Circuit discussed this very issue. The Court stated:

> This does not mean, however, that Congress intended that by merely following the formal procedure of section 6861, the IRS should have thereby complete license to act arbitrarily and in bad faith and for other than the purpose of preserving revenue. Supra at 1084

In concluding that the case should be remanded, the Court of Appeals noted:

> When the IRS has acted ostensibly under section 6861, but in fact has used the jeopardy assessment as a device to harass a taxpayer or as a leverage to exert pressure on a taxpayer for nontax purposes, it has exceeded its statutory authority. Section 7421 does not yield such unauthorized acts from judicial review; since they are not authorized by section 6861, there are prohibited by the general provisions of section 6213 and are subject to the injunction authorized therein. Supra at 1084.

To conclude, as the Court did below, that it will not review the considerations involved in making a jeopardy is to blithely ignore whether the "belief" of the Secretary or his delegate , as set forth by the statute, is a good faith belief or not, and to thereby permit the Internal Revenue Service to exercise unbridled discretion involving a confiscatory procedure for any underlying purpose whatsoever, including nontax motives.

Further, if the rationale of these decisions upon which the Court below relied, is permitted to be the rule of this Circuit, an anomoly will be permitted to persist. Simply, a taxpayer is allowed under Enochs and Shapiro to attach the underlying assessment and collection of asserted income, estate or gift taxes, even though Section 7421(a) states that "no suit,,. shall be maintained." Yet, he will not be permitted to question the basis - the belief that jeopardy to the revenue exists - that gave rise to the assessment, even though there is no statutory prohibition to a suit attacking the assessment.

## CONCLUSION

For all these reasons, the opinion and order of the Court below should be reserved. Appellants also request that they be allowed costs of this appeal.

Respectfully submitted,

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April 5, 1976

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

Court of Appeals
For the Second Circuit

Andrew L. Stone & M. Jeane Stone
Plaintiffs-Appellants,

- against -

United States of America et al,
Defendants-appellees

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Reuben A. Shearer being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030

That on the 5th day of April 1976 at 1 St Andrews Plaza N.Y. N.Y.

deponent served the annexed Appendix Brief upon Robert B Fiske jr.

the in this action by delivering ✓ a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.

Sworn to before me, this 5th day of April 1976

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer

Reuben Shearer